

No. 17-3352

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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Telescope Media Group, Carl Larsen, and Angel Larson,

Appellants,

vs.

Kevin Lindsey and Lori Swanson,

Appellees.

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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**DEFENDANTS-APPELLEES' SUPPLEMENTAL BRIEF**

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# TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
ARGUMENT .....	2
I. <i>MASTERPIECE CAKESHOP</i> RE-AFFIRMED STATE AUTHORITY TO OUTLAW DISCRIMINATION. ....	2
II. <i>NIFLA</i> AND <i>JANUS</i> DO NOT COMPEL A DIFFERENT OUTCOME. ....	6
CONCLUSION .....	8

## TABLE OF AUTHORITIES

	Page
<b>FEDERAL COURT CASES</b>	
<i>Citizens United v. Federal Election Comm’n</i> , 558 U.S. 310 (2010).....	6
<i>Hurley v. Irish-American Gay, Lesbian &amp; Bisexual Group of Boston</i> , 515 U.S. 557 (1995).....	1, 3
<i>Janus v. American Federation of State, County &amp; Municipal Employees, Council 31</i> , 138 S. Ct. 2448 (2018).....	1, 6, 7, 8
<i>Knox v. Service Emps. Int’l Union, Local 1000</i> , 567 U.S. 298 (2012).....	7
<i>National Institute of Family &amp; Life Advocates v. Becerra</i> , 138 S. Ct. 2361 (2018).....	1, 6, 8
<i>Newman v. Piggie Park Enterprises, Inc.</i> , 390 U.S. 400 (1968).....	3
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015).....	5
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984).....	1, 2, 7, 8
<i>Rumsfeld v. Forum for Academic &amp; Institutional Rights</i> , 547 U.S. 47 (2006).....	2
<i>Sorrell v. IMS Health, Inc.</i> , 564 U.S. 552 (2011).....	6
<i>Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission</i> , 138 S. Ct. 1719 (2018).....	passim
<i>United States v. Windsor</i> , 570 U.S. 744 (2013).....	5

**STATE COURT CASES**

*State by McClure v. Sports & Health Club, Inc.*,  
370 N.W.2d 844 (Minn. 1985).....2

**STATUTORY AUTHORITIES**

Minn. Stat. Ch. 363A.....1, 2

## INTRODUCTION

This brief is submitted in response to the Court’s order authorizing supplemental briefing on three new decisions of the United States Supreme Court—*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018); *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (hereinafter “*NIFLA*”); and *Janus v. American Federation of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018).

Appellants’ Supplemental Brief continues to attempt to recast the Minnesota Human Rights Act (“MHRA”), Minn. Stat. Ch. 363A, as an act of state oppression. But the long-standing state anti-discrimination statute is simple and straightforward—businesses offering their goods or services to the public cannot refuse to serve customers based on protected status, *i.e.* based on race, gender, religion, and sexual orientation, among others. Minn. Stat. Ch. 363A. The United States Supreme Court has long recognized the validity and constitutionality of Minnesota’s law. *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (holding that MHRA does not violate First Amendment); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (explaining that state anti-discrimination laws will not, “as a general matter, violate the First or Fourteenth Amendment”). The Supreme Court’s October 2017 term decisions do not disturb this longstanding law.

## ARGUMENT

### I. **MASTERPIECE CAKESHOP RE-AFFIRMED STATE AUTHORITY TO OUTLAW DISCRIMINATION.**

The MHRA does not punish speech, curtail free association, or discriminate on the basis of religion. *See Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 62 (2006); *Jaycees*, 468 U.S. at 628; *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 851 (Minn. 1985). Instead, the MHRA regulates solely conduct, namely the sale of goods and services to customers. *Jaycees*, 468 U.S. at 628; Minn. Stat. §§ 363A.11, 17. Furthermore, to the extent the generally applicable law incidentally affects First Amendment rights, the MHRA is content and viewpoint neutral because it does not favor one type of speech over another and is indifferent to the business owner's viewpoint. *Jaycees*, 468 U.S. at 628; *Rumsfeld*, 547 U.S. at 62.

In *Masterpiece Cakeshop*, the Supreme Court again considered the constitutionality of a state anti-discrimination law. The case involved a cake baker from Colorado who declined to sell a cake to two men for their wedding reception. 138 S.Ct. at 1724. The Colorado Civil Rights Commission brought an enforcement action, and found that the baker had violated Colorado's anti-discrimination statute because he had declined to sell the cake based on the men's sexual orientation, which is a protected characteristic under Colorado law. *Id.* at 1726. The baker argued that the enforcement of Colorado anti-discrimination law

against him violated the First Amendment rights of free speech and free exercise.

*Id.* at 1727.

In considering the baker's claims, the United States Supreme Court recognized the authority of states to protect the dignity of their citizens, explaining that:

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts.

138 S. Ct. at 1727. Further, while “religious and philosophical objections are protected,” the Court explained that it “is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” *Id.* (citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n.5 (1968) (per curiam); see also *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572 (1995) (“Provisions like these are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments”)).

As such, the Court said that it was “unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.” *Masterpiece Cakeshop*, 138 S.Ct. at 1728. The Court also recognized the risk of creating exemptions for anti-discrimination laws because “a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights law that ensure equal access to goods, services, and public accommodations.” *Id.* at 1727.

Just as Appellants do here, the baker in *Masterpiece Cakeshop* argued that requiring him to create custom wedding cakes compelled him to engage in an “expressive activity” in violation of the First Amendment. *Id.* The Supreme Court did not decide the case based on that issue, however. *Id.* The Court did not determine that baking was an expressive activity, and it did not apply the compelled speech doctrine. *Id.* at 1728-29. Instead, the case turned solely on details about how the specific enforcement action against the baker had proceeded in Colorado. *Id.* at 1729-32.

First, the Court noted that the Colorado enforcement action against the baker was predicated on acts that had occurred in 2012, at a time when state and federal

recognition of same-sex marriage was changing. *Id.* at 1728. Colorado had not yet recognized same-sex marriage, and the Court had not issued its decisions in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) or *United States v. Windsor*, 570 U.S. 744 (2013). *Id.* In this case, by contrast, Appellants have not been subject to any enforcement action, and both state and federal laws recognizing same-sex marriages are clearly established.

Further, the Court found that the Colorado Civil Rights Commission had not enforced the anti-discrimination law against the baker in a neutral manner. *Id.* at 1729-31. The conclusion was based on statements made by Commissioner's during enforcement proceedings, as well concerns that the Commission's enforcement actions had been inconsistent. *Id.* at 1729-31. These actions and statements were found to evidence bias against the baker's religious beliefs. *Id.* Here, Appellants' brought a pre-enforcement case and no similar facts are present.

The Supreme Court decision in *Masterpiece Cakeshop* reinforced the general constitutionality of state anti-discrimination laws, and recognized the risks of creating broad exceptions to those laws. Furthermore, despite the invitation to reach a broader holding, the Court instead issued a narrow, case-specific decision focusing on enforcement details not at issue in this case. As such, *Masterpiece Cakeshop* reinforces the principles underlying the district court decision and supports its affirmance.

## II. *NIFLA* AND *JANUS* DO NOT COMPEL A DIFFERENT OUTCOME.

The other two First Amendment decisions on which briefing has been ordered, *NIFLA*, 138 S. Ct. 2361, and *Janus*, 138 S. Ct. 2448, both involve the application of the compelled speech doctrine to statutes that are very different from the MHRA. By contrast, *Masterpiece Cakeshop*, which was issued just a few weeks prior, was not based on the compelled speech doctrine.

In *NIFLA*, 138 S. Ct. 2361, the Court considered a California law called the FACT Act, which mandated that certain clinics and pregnancy centers give patients a specifically-worded notice about the availability of free or low-cost pregnancy services, including abortions. *Id.* at 2368-69.

The Court re-affirmed that the “First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.” *Id.* at 2373 (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011)); *see also* Appellees’ Br. at 11 (citing same). However, *NIFLA* did not involve a conduct-based statute like the MHRA. Instead, the FACT Act regulated “speech as speech,” and was a content-based restriction. 138 S. Ct. at 2374, 2377.

The Court explained that it is “deeply skeptical of laws that ‘distinguish among different speakers, allowing speech by some but not others.’ ” *Id.* at 2378 (quoting *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 340 (2010)). Because the FACT Act treated pro-life pregnancy clinics different from general

practice clinics, it held that the law did not pass even intermediate scrutiny. *Id.* at 2377-2378.

By contrast, the United States Supreme Court has held that the MHRA regulates conduct, not speech, *Jaycees*, 468 U.S. at 624-6; any impact on speech is incidental, applies to all businesses, and is content- and view-point neutral, *id.* at 623-4; and the law is narrowly-tailored and serves important state interests, *id.* at 624-27. *See generally* Appellees' Brief at 10-18.

The Court's decision in *Janus*, 138 S. Ct. 2448, also involved a state law that is very different from the MHRA. *Janus* concerned the constitutionality of an Illinois "fair-share" law, which the Court said required public employees "to provide financial support for a union that 'takes many positions during collective bargaining that have powerful political and civic consequences.'" 138 S. Ct. at 2464 (quoting *Knox v. Service Emps. Int'l Union, Local 1000*, 567 U.S. 298, 310-11 (2012)). The Court held that requiring employees to financially subsidize the union compelled speech, and that Illinois' justifications did not survive scrutiny. *Id.* at 2459, 2486.

Here, the MHRA does not compel Appellants, or any business, to create or publish speech, and does not regulate the message of any speech by the businesses. *Jaycees*, 468 U.S. at 623-24 (explaining that the "goal" of the MHRA is "unrelated to the suppression of expression"). While Appellants try to rely on *Janus* to argue

that the MHRA is “tyrannical,” “unthinkable,” and should be “universally condemned.” App. Supp. Br. at 5, the United States Supreme Court has instead found that Minnesota’s law “plainly serves compelling state interests of the highest order.” *Jaycees*, 468 U.S. at 624. Indeed, when given the opportunity to consider Colorado’s similar anti-discrimination statute just a few weeks prior to the *Janus* decision, the Court once again recognized the general value and constitutionality of state anti-discrimination statutes. *Masterpiece Cakeshop*, 138 S.Ct. at 1727-28. The Court also did not strike the Colorado law down on the basis that it compelled speech. *Supra* at I.

Appellants’ reliance on *NIFLA* and *Janus* are misplaced. The district court’s decision should be affirmed, and the decisions issued during the United States Supreme Court’s October 2017 term do not mandate a different result.

### **CONCLUSION**

For the foregoing reasons, Appellees respectfully request the Court affirm the district court decision.

Dated: August 15, 2018

Respectfully submitted,

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s/ **Alethea M. Huyser**

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**CERTIFICATE OF COMPLIANCE  
WITH FRAP 32**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,763 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt Times New Roman font.

s/ **Alethea M. Huyser**

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The undersigned, on behalf of the party filing and serving this brief, certifies that the brief has been scanned for viruses and that the brief is virus-free.

s/ **Pamela Hewitt**

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